

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM B. KISSANE,

Plaintiff-Appellant,

v

STATE OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

March 12, 2009

No. 288178

Genesee Circuit Court

LC No. 08-088604-CZ

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant. In his complaint, plaintiff challenged the constitutionality of MCL 770.16 as applied to him. Because we conclude that there were no errors warranting relief, we affirm.

Plaintiff first contends the trial court erred in denying his motion to disqualify the judge assigned to his case. When reviewing a ruling on a motion to disqualify, the factual findings of the lower court are reviewed for an abuse of discretion, while the court's application of the law to those facts is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503 and n 38; 548 NW2d 210 (1996).

Plaintiff asserts that the trial Judge Richard Yuille should have disqualified himself because he had previously ruled on similar claims brought by plaintiff in his criminal case and was consequently biased against plaintiff's claims. As this Court has explained, prior judicial rulings that are unfavorable to a party are not, by themselves, indications that the judge is biased against that party. *Armstrong v Ypsilanti Charter Township*, 248 Mich App 573, 597; 640 NW2d 321 (2001). That proposition holds true even where the prior holdings were erroneous. Rather, a judge who previously ruled against a party only needs to disqualify himself where his previous ruling exhibited antagonism or a deep-seated favoritism that overcomes a "heavy presumption of judicial impartiality." *Id.*

In arguing that Judge Yuille was biased, plaintiff points to Judge Yuille's 2003 ruling in his criminal case, in which he held that MCL 770.16 did not permit the court to order DNA testing of hair that allegedly belonged to the victim. However, plaintiff does not explain how this ruling demonstrates that Judge Yuille is biased. He does not point to any behavior or statement that demonstrates antagonism or deep-seated favoritism. Furthermore, he does not

even assert that Judge Yuille's ruling was erroneous. Hence, the judge's prior rulings do not serve as a basis for disqualification.

Plaintiff also asserts that disqualification was warranted because Judge Yuille, as a result of his prior involvement with plaintiff's case, had knowledge of the facts. A trial judge is disqualified from a matter where "[t]he judge has personal knowledge of disputed *evidentiary* facts concerning the proceeding." MCR 2.003(B)(2) (emphasis added). Here, plaintiff makes no assertion that Judge Yuille had knowledge of a disputed evidentiary fact. Rather, the question presented to Judge Yuille was wholly legal and did not depend on any evidentiary knowledge. Therefore, MCR 2.003(B)(2) is inapplicable.

The trial court did not abuse its discretion.

Plaintiff next asserts that it was error for the trial court to grant defendant's motion for summary disposition without first ruling on plaintiff's motion for a default judgment. In so arguing, plaintiff implies that the trial court did not require defendant to make a showing that its default was excusable. However, this implication is inaccurate. On the day that the trial court granted defendant's motion for summary disposition, it also granted defendant's motion to set aside the previously entered default. By setting aside the default, the trial court implicitly denied plaintiff's motion for entry of a default judgment. And plaintiff presents no authority for the proposition that the trial court could not set aside the default on the same day that it rules on a motion for summary disposition. Therefore, defendant has abandoned any claims of error in this regard. See *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 173; 721 NW2d 233 (2006).

Finally, plaintiff asserts that the trial court improperly granted defendant's motion for summary disposition after concluding that MCL 770.16 was constitutional. However, we find that consideration of this claim is barred by principles of res judicata.

In 2003, plaintiff brought a motion for relief from judgment and asserted that he was entitled to DNA testing under MCL 770.16. At the hearing on the motion, the trial court indicated that MCL 770.16 appeared to only apply when the biological material presented was alleged to have belonged to the defendant. For that reason, it concluded that it did not have the authority to order a crime victim to submit biological material. In response, plaintiff did not raise any constitutional concerns or allege that the trial court's interpretation would violate constitutional principles. Our Supreme Court has held that the theory of res judicata is to be broadly applied. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160; 294 NW2d 165 (1980). As a result, res judicata bars claims that have already been litigated, as well as "those claims arising out of the same transaction which plaintiff could have brought, but did not." *Id.* Plaintiff had the opportunity to litigate the constitutionality of MCL 770.16 when he brought his motion before the trial court and in his later appeals. Therefore, this Court will not consider plaintiff's claims.

There were no errors warranting relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly